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INTRODUCTION

In 1996, only 5% of discoverable documents derived from electronic format.[1] Today, over 90% of all corporate information, much of which is discoverable, is in electronic format, and 70% of that information has never been printed to paper.[2] In some cases, the electronic information is as large as a terabyte; printed to paper, this information would fill the Sears Tower four times.[3] Nevertheless, the previous version of the Federal Rules of Civil Procedure ("the Rules") provided "scant guidance as to when and in what form production of such material is appropriate."[4] Consequently, in 2006, the Rules were amended specifically to "address . . . discovery of electronically stored information."[5] One issue addressed, and partially resolved, by the amendments is that electronic documents and data can be stored and produced in several different forms.[6]

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1. Daryl Teshima, *Seven Deadly Sins of Electronic Discovery*, L. OFF. COMPUTING, June-July 2003, *available at* http://www.strategicdiscovery.com/deadlysinsoi.htm.

2. C.C. Holland, *E-Mail Analytics Eases Burden of Discovery*, LAW.COM, Oct. 3, 2006, http://www.law.com/jsp/legaltechnology/PubArticleFriendlyLT.jsp?id=1159792526769; *see also* Richard Herrmann et al., *Managing Discovery in the Digital Age: A Guide to Electronic Discovery in the District of Delaware*, 8 DEL. L. REV. 75, 75 (2005) ("[C]urrent statistics indicated that 93% of all documents in the United States are created electronically."); Teshima, *supra* note 1 ("[O]ver 90 percent of all corporate communications is now electronic, and less than 30 percent is ever printed (and thus collectible in paper form).").

3. Jason Krause, *The Top Ten in Tech: It's Not Just What Stuff You Use, But What You Do with It*, 90 A.B.A. J. 34, 38 (2004).

4. Ryan Horning et al., *The Law & Technology: Electronic Discovery: The New Rules*, 20 CHI. BAR ASS'N REC. 51, 51 (2006).

5. JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, AGENDA E-18, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at Rules-Page 26 (2005) [hereinafter JUDICIAL CONFERENCE REPORT], *available at* http://www.uscourts.gov/

Because electronic information can be provided in many different formats, the rule that deals with the procedure for document production, Federal Rule of Civil Procedure 34(b) (hereinafter "Rule 34(b)"), was amended to explain how parties should ask for different forms of production.[7] In addition to describing how such requests should be made, Rule 34(b) contains several provisions dealing with what parties must do if there has been no request for a specific form.[8] Rule 34(b)(ii) lists two alternatives for the default form of production: the party can provide the documents in the form which the information is "ordinarily maintained" or in a form that is "reasonably usable."[9]

Despite efforts to make electronic discovery easier, the Rules do not explain what is specifically required by the default form of production.[10] The default form is necessary when a party's request "does not specify the form or forms for producing electronically stored information."[11] Since Rule 34(b) does not define "ordinarily maintained" or "reasonably usable," it is not clear what a producing party can leave out of the documents they produce. Additionally, because the producing party must produce the information as it is "kept in the usual course of business,"[12] it is not clear how this requirement works in combination with the requirement that the producing form be one that is "ordinarily maintained" or "reasonably usable." Finally, Rule 34 does not specify which default form should prevail if there is a conflict. For example, if the information is provided in a form that is "ordinarily maintained" but that is not "reasonably usable," it is not clear whether the Rule would be satisfied. The issue is further complicated by the fact that the amended Rule 34(b) permits a party to produce the requested information in only one form.

This Note attempts to address all of these issues by focusing on how courts and parties have dealt with these default forms. Specifically, this Note looks at the option of providing information in an "ordinarily maintained" form, compared with providing it in a "reasonably usable" form. The ultimate question is: What is required of the parties under Rule 34(b)(ii)?

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rules/Reports/ST09-2005.pdf.

6. *Id.* at Rules-Page 26–27.

7. FED. R. CIV. P. 34 advisory committee's notes.

8. FED. R. CIV. P. 34(b).

9. FED. R. CIV. P. 34(b)(ii).

10. *See* Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 649 (D. Kan. 2005) ("Although the proposed amendments to Rule 34 use the phrase 'in a form or forms in which it is ordinarily maintained,' they provide no further guidance as to whether a party's production of electronically stored information 'in the form or forms in which it is ordinarily maintained' would encompass the electronic document's metadata.").

11. FED. R. CIV. P. 34 (b)(ii).

12. FED. R. CIV. P. 34 (b)(i).

This issue is especially important because electronic discovery has become a very important part of litigation. Even though the Rules anticipate and encourage parties to make specific requests for the format for production they desire, it may be unreasonable to expect "one party to know the format of the other party's electronic information well enough to request a particular format at such an early stage."[13] Consequently, the default format will likely be a topic of concern, and both parties and courts should be aware of these difficulties, as well as the possible solutions.

Individual plaintiffs may also be affected by these amendments, because electronic discovery is not limited to disputes between large corporations over complex transactions.[14] This is evidenced by plaintiffs' counsel's advocacy at the public hearings on the proposed amendments, where they argued that requiring a specific form may impose undue burden on plaintiffs who are not technologically savvy enough to know how to frame their request.[15] Because the amendments have been in operation for a short time, few courts have interpreted the new provisions.

This Note will begin by laying out a background of electronic discovery and the amendments to the Rules. After presenting the background, the Note will analyze the problem of default production by interpreting what the Rule means. First, the Note will look at Rule 34(b)'s language to determine its plain meaning. Then it will examine Rule 34(b) under the Rules' principle of interpretation set forth in Rule 1, which requires a construction that secures "the just, speedy, and inexpensive determination of every action."[16] Finally, the Note will examine the drafting history of the amendments to determine the drafters' intent.

The Note will next demonstrate that one cannot determine what Rule 34(b) requires through a plain meaning analysis, because of Rule 34(b)'s ambiguity. After looking to the policy of Rule 1 and the drafting history of Rule 34, the Note will show that the phrases "ordinarily maintained" and "reasonably usable" both require the production of information in an objectively reasonably accessible format. Despite the rare occasion where the responding party is required only to produce the information in an "ordinarily maintained" form (for example, if it does not have the information in a "reasonably usable" form), if the producing

13. Alan F. Blakley, *Unanswered Questions in the December 2006 Federal Rules Changes*, 53 FED. LAW. 39, 44 (2006).

14. *See, e.g.*, Zubulake v. UBS Warburg, 217 F.R.D. 309, 311–12 (S.D.N.Y. 2003) (discussing electronic discovery in a suit by an individual worker against her employer for gender discrimination and illegal retaliation).

15. Alan F. Blakley, *Document Production in a Strange Native Land*, 53 FED. LAW. 16, 17 (2006).

16. FED. R. CIV. P. 1.

party assists the receiving party to access the information effectively, it becomes the equivalent of producing the information in a "reasonably usable" form. Contrary to the appearance of Rule 34, a party must always produce data in a "reasonably usable" form. In effect, a "reasonably usable" form is not an alternative—it is a requirement.

Even though Rule 34(b)(ii) seems to say that a party does not have to produce documents in a form that is "reasonably usable" if it produces them in a form that is "ordinarily maintained," the production of information in a form that is only "ordinarily maintained," but not "reasonably usable," would be contrary to the policy of Rule 1 and the intent behind the Rules as a whole. This Note encourages courts and drafters of future rules of civil procedure to explicitly recognize the problems with this construction and resolve any ambiguity created by Rule 34(b).

I. BACKGROUND

A. A BRIEF INTRODUCTION TO ELECTRONIC DISCOVERY

Traditional paper discovery "refers to the discovery of writings on paper that can be read without the aid of some devices."[17] Electronic discovery, on the other hand, refers to the discovery of "documents and data [that] exist in a medium that can only be read through the use of computers."[18] Data on media such as "cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes" are all electronic because they can only be read through the use of special devices.[19] Because this data includes "business applications, such as word processing, databases, and spreadsheets [and] Internet applications, such as e-mail and the World Wide Web,"[20] it has become a substantial, if not a central, part of discovery.[21]

Electronic discovery is different from paper discovery in several ways, which all have important consequences for litigation. For example, electronic data is more voluminous, more persistent, more dynamic, and easier to search than paper documents.[22] One of the most significant

17. *The (2004) Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 5 SEDONA CONF. J. 151, 151 (2004) [hereinafter *Sedona Principles*]; *see also* Horning et al., *supra* note 4, at 52. Paper discovery can also refer to "images on paper," as well as writings. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 173 (2006).

18. *Sedona Principles*, *supra* note 17.

19. *Id.*

20. Bank of Amer. Corp. v. SR Int'l Bus. Ins. Co., No. 05-CV5-5564, 2006 WL 3093174, at *6 (N.C. Super. Ct. Nov. 1, 2006).

21. Richard Marcus, *E-Discovery & Beyond Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 650 (2006).

22. *See* Horning et al., *supra* note 4, at 52.

differences is the choice of forms of production that electronic discovery provides.[23]

Before electronic discovery, documents were only produced in paper form.[24] Even though some documents, like microfilm, were stored in a non-paper format, these forms "would be printed out on paper for the purposes of discovery or document production."[25] In contrast, electronic discovery can be stored and produced in several different forms.[26] For example, a particular document can be produced "as a paper printout, as a word processing file, exported to various other computer-readable file formats, or imaged in TIFF [Tagged Image File Format] or PDF [Portable Document Format] formats."[27]

Initially, the form-of-production discovery disputes focused on paper versus electronic.[28] Today, because of the variety of electronic forms, litigation disputes have shifted to focusing on the particular form of electronic production.[29] Choosing electronic formats has become a strategic decision, because each format conveys different information and allows different levels of analysis, as well as logistical advantages and disadvantages.[30] For example, documents produced in TIFF or PDF were converted from native files into photocopy-like static images where on screen they appear as paper printouts.[31] These formats have the advantage of being portable and static—"they can be Bates stamped, categorized and gathered into virtual file folders, and even readily printed out for those who insist on handling paper."[32]

In contrast to the static formats, electronic files in their native format, such as a word processing document, database, or spreadsheet, are "dynamic,... behav[ing] the way they do in the active business environment."[33] Information in native file formats contains "embedded data," consisting of editorial comments and changes, as well as functions like mathematical formulas.[34] The "embedded data," while not visible on the computer screen, keeps track of prior versions of the visible data.[35]

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23. *See* FED. R. CIV. P. 34(b); Withers, *supra* note 17, at 186–88.

24. Withers, *supra* note 17, at 186.

25. *Id.*

26. Carl G. Roberts, *The 2006 Discovery Amendments to the Federal Rules of Civil Procedure*, METRO. CORP. COUNS., Sept. 2006, at 45, *available at* http://www.metrocorpcounsel.com/pdf/2006/September/45.pdf.

27. *Id.*

28. Withers, *supra* note 17, at 188.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2219 (Supp. 2007).

Files in their native format also contain non-apparent embedded records of the document's creation and management, called "metadata."[36] "Metadata," or data about data, "describes the various instructional software directives . . . that permit a computer program to access and manipulate data."[37] It can be very useful to litigants because it "can provide an electronic paper trail of who touched the document and what they did."[38] In fact, by showing when a document was created or who worked on the document, it has frequently been used by litigants as "'smoking gun' evidence."[39]

B. Electronic Discovery and the Federal Rules of Civil Procedure

In the 1930s, inventions that would lead to electronic discovery had not yet been invented—there was no Internet, no word-processing, no electric typewriters, and no photocopier.[40] For this reason, discovery of electronic materials was not contemplated when the Rules were first created in 1938.[41] Over the next three decades, technological developments created a large impact on discovery, and in 1970, the Rules were amended "to accord with changing technology" and to account for discovery of "electronic data compilations from which information can be obtained only with the use of detection devices."[42] These data compilations were included in the Rules as an example of "documents," on the assumption that electronic information fell within the broad definition of "documents" in the Rules.[43]

The Advisory Committee Notes accompanying the 1970 version of Rule 34 stated that because the producing party may have to translate the documents into usable form, "in many instances, this means that respondent will have to supply a print-out of computer data."[44] Thus, the 1970 version of Rule 34 did not speak to the possibility of multiple forms, because the assumption was that electronic data would be produced as computer printouts. This assumption was based on the notion that "in those days, computers were owned and operated only by the largest and most sophisticated banks, insurance companies, academic institutions,

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36. Withers, *supra* note 17, at 188.

37. 8A Wright & Miller, *supra* note 35.

38. Peter Mierzwa, *Metadata: Now You Don't See It—Now You Do*, 20 Chi. Bar Ass'n Rec. 52, 52 (2006).

39. *See id.*

40. Richard Marcus, *Complex Litigation at the Millennium: Confronting the Future: Coping with Discovery of Electronic Material*, 64 Law & Contemp. Probs. 253, 259 (2001).

41. *See* Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) ("It may well be that Judge Charles E. Clark and the framers of the Federal Rules of Civil Procedure could not foresee the computer age.").

42. Fed. R. Civ. P. 34 advisory committee's notes; *see also* Marcus, *supra* note 40, at 258.

43. Marcus, *supra* note 21, at 650.

44. Fed. R. Civ. P. 34 advisory committee's notes.

and government agencies."[45] Because most litigants did not possess and operate computers, "[p]roduction of electronically stored information in electronic form would have been useless."[46] Consequently, even though the old Rule 34 did not discuss choices of form of production, or default forms of production, the omission was not problematic during that time period.

Due to the advancement of technology, the old Rule 34 became insufficient for addressing important litigation problems. By the mid 1980s, most litigation involved "discovery of some type of computer-stored information,"[47] and the emerging reality was that some electronically stored information did not fit into any of the existing definitions of "document."[48] An example of such problems was the debate over whether a web page constitutes a document or documents.[49] Another issue was whether dynamic databases that are "capable of providing a variety of information in response to a query [and are] constantly changing as data are added or modified" could be called documents.[50]

Further technological advances led to the mass production of computers, resulting in smaller and cheaper models. As computers became ubiquitous, "running standardized operating systems and off-the-shelf application software, the exchange of electronically stored information in a variety of forms became possible."[51] Even though large scale document production in paper form was still common in smaller cases, it was considered expensive and burdensome for most other cases.[52] The 1970 Rule 34, however, did not address the possibility of multiple forms of production, and was thus insufficient to address these changes in technology.

In the late 1990s, the Rules were again amended, but the topic of electronic discovery was not directly addressed.[53] However, the issue of electronic discovery was brought up during the public comment period, and the Rules' Advisory Committee decided to make electronic discovery the focus of the next set of amendments.[54] Thus, the Advisory Committee embarked on an "extraordinarily broad, open, and inclusive rulemaking process," lasting five years, to answer three fundamental issues: (1) the differences between conventional and electronic discovery;

45. Withers, *supra* note 17, at 186.
46. *Id.*
47. Bills v. Kennecott Corp., 108 F.R.D. 459, 462 (D. Utah 1985).
48. Marcus, *supra* note 21, at 650.
49. *See id.*
50. *Id.*
51. Withers, *supra* note 17, at 186.
52. *Id.*
53. *Id.* at 191–92.
54. *Id.* at 192.

(2) whether these differences create problems that can, or need to be addressed through changes in the Rules; and (3) whether there are problems that the Rules could or should address, and what rules could be crafted to serve that purpose.[55]

The resulting amendments, which went into effect in December 2006, significantly changed most discovery rules. Electronically stored information was no longer considered a subset of "documents," as was the case under the 1970 Amendments.[56] Instead, under the revised Rules, electronic data was considered to be a separate category, co-equal to "documents," if not central to all discovery.[57] The new amendments also included important provisions regarding early conferences,[58] asserting claims of privileges,[59] spoliation and loss of electronically stored information,[60] and sanctions.[61] The amended Rules also addressed the possibility of multiple forms of production of electronically stored information in Rule 34(b).[62]

As amended, Rule 34(b), which sets forth the procedure for document requests and production, clarifies much of the procedure for electronic discovery, but remains ambiguous in several ways that could still impact litigation. Specifically, the requirements for the default production of electronically stored information are not clear in the Rules. In order to examine this ambiguity in greater detail, it is necessary to turn to Rule 34(b) itself.

C. THE CHANGES TO RULE 34(b)

As amended, Rule 34 deals with "Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes."[63] Subsection (a) begins by describing the scope, stating that a party may request "to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form."[64]

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55. *Id.* at 172, 192.
56. Marcus, *supra* note 21, at 650.
57. *Id.*
58. FED. R. CIV. P. 16.
59. FED. R. CIV. P. 26.
60. FED. R. CIV. P. 37.
61. *Id.*
62. FED. R. CIV. P. 34(b).
63. FED. R. CIV. P. 34.
64. FED. R. CIV. P. 34(a).

Subsection (b) then sets out the procedure for requesting the information. The text of Rule 34(b) as amended by the 2006 amendments states:

> (b) PROCEDURE. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. *The request may specify the form or forms in which electronically stored information is to be produced.* Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).
>
> The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, *including an objection to the requested form or forms for producing electronically stored information,* ~~in which event~~ stating the reasons for the objection ~~shall be stated~~. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. *If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use.* The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.
>
> *Unless the parties otherwise agree, or the court otherwise orders*: *(i)* ~~A~~ *a* party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; *(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (iii) a party need not produce the same electronically stored information in more than one form.*[65]

By looking at the amended text, one can see that the central focus in amending Rule 34(b) was to specify the procedures regarding the forms of production. After the amendments, a party may now request the form of production that it desires, and the responding party can object to that requested form.[66] The old Rule 34 did not have any provisions for specifying the forms in which electronic information was to be produced.[67] If the parties do not agree on a format and the court does not

65. JUDICIAL CONFERENCE REPORT, *supra* note 5, at 69–71. Italicized text is the text added by the 2006 Amendments; strikethrough text is the text deleted by the 2006 Amendments.

66. FED. R. CIV. P. 34(b).

67. *See* FED. R. CIV. P. 34 (1970).

order the use of any format, Rule 34 provides that the documents and data are to be produced in the form in which they are "kept in the usual course of business."[68] This provision did not change, and although there may be some dispute as to what "usual course of business" entails, it is relatively straightforward. Rule 34 next lays out the new requirement for default production, which is not entirely clear. It states that where no specification is made, the information is to be produced in the form "in which it is ordinarily maintained," or in a form that is "reasonably usable."[69] Finally, Rule 34 allows the producing party to produce the information in only one form.[70]

It is important to note that although the amended Rule 34(b) is ambiguous as to the requirements for the default form of production, it does clarify many important discovery issues with respect to specified forms of production, and is more helpful to litigants and courts than its predecessor.

II. ANALYSIS

When the Rules are interpreted, they are supposed to be given their plain meaning.[71] As with statutory interpretation, if the Rule's terms are clear and unambiguous, the inquiry is complete.[72] In addition to looking at the language, one must construe each Rule as part of a procedural system.[73] Pursuant to the requirements of Rule 1, each rule "shall be construed . . . to secure the just, speedy, and inexpensive determination of every action."[74] However, if a Rule's language is ambiguous and if the plain meaning cannot be determined, the Advisory Committee Notes may be referred to in order to aid interpretation.[75] As explained below, Rule 34(b)(ii) is not clear and unambiguous, and we must look to the other sources to aid in its interpretation.

A. THE LANGUAGE OF RULE 34(b)(ii)

Although the language of Rule 34(b)(ii) appears clear because the terms "ordinarily maintained" and "reasonably usable" do not appear vague, there is latent ambiguity in both terms that could lead to discovery disputes.

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68. FED. R. CIV. P. 34(b)(i).

69. FED. R. CIV. P. 34(b)(ii).

70. FED. R. CIV. P. 34(b)(iii).

71. Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120, 123 (1989); *see also* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., 498 U.S. 533, 540–41 (1991); Schiavone v. Fortune, 477 U.S. 21, 30 (1986); City of Merced v. Fields, 997 F. Supp. 1326, 1337 (E.D. Cal. 1998).

72. *Pavelic & LeFlore*, 493 U.S. at 123; *see also Bus. Guides*, 498 U.S. at 540–41; *Schiavone*, 477 U.S. at 30; *Merced*, 997 F. Supp. at 1337.

73. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (Supp. 2007); *see also Merced*, 997 F. Supp. at 1337.

74. FED. R. CIV. P. 1; *see also Merced*, 997 F. Supp. at 1337.

75. 4 WRIGHT & MILLER, *supra* note 73; *see also Merced*, 997 F. Supp. at 1337.

Determination of the meaning and requirement of Rule 34(b)(ii) begins with the language of the Rule. Rule 34(b)(ii) provides two options for default production of electronically stored information: "[I]f a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable."[76]

Thus, the two options for producing electronically stored information are a form in which the information is "ordinarily maintained" or in a form that is "reasonably usable."[77]

1. Production in "Ordinarily Maintained" Form

The phrase "ordinarily maintained" is not defined in Rule 34, so one must look to its plain meaning.[78] Looking to the dictionary, "ordinarily maintained" means a form that is normally or customarily kept.[79] Although the plain meaning seems relatively clear, there is ambiguity in the words that will affect litigation. Specifically, there will be dispute as to what "ordinarily" means.

One can imagine a situation where a party has the same electronically stored information in several different forms. Because Rule 34(b) requires the production of only one form, and the responding party could strategically choose to give the requesting party the least accessible form, parties could dispute whether that form is in fact "ordinarily" maintained. For instance, "legacy" data, which refers to data that can only be used by obsolete, superseded systems,[80] may be offered by the responding party as a way of satisfying the default production requirements under Rule 34(b). If the responding party keeps this outdated data alongside updated formats, it could still argue that such antiquated data is "ordinarily maintained."

The requesting party, however, would have a hard time viewing and using the information in the "legacy" form. The requesting party may not possess the necessary systems and tools to access the data because "the physical media on which digital information is stored, and the hardware needed to retrieve that information, are constantly changing to accommodate advances in technology."[81] Off-the-shelf operating systems and application software are updated at an ever-increasing pace, and their predecessors become "outdated and unavailable after only a few

76. FED. R. CIV. P. 34(b)(ii).

77. *Id.*

78. Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120, 123 (1989).

79. *See* WEBSTER'S DICTIONARY 749, 873 (11th ed. 2003).

80. FED. R. CIV. P. 34(b) advisory committee's notes; *see also* Lloyd S. van Oostenrijk, *Comment: Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163, 1175 (2005).

81. Withers, *supra* note 17, at 175.

years."[82] Even though a great deal of electronically stored information becomes inaccessible every day, the "legacy" data does not disappear.[83] The requesting party would therefore have to argue that such legacy data is not "ordinarily" maintained.

This problem is further complicated by the fact that Rule 34(b)(ii) lists producing information in a "reasonably usable" form as an *alternative* to producing it in a form that is "ordinarily maintained." These alternative options suggest that a party can produce electronically stored information in an "ordinarily maintained" form even if that form is not "reasonably usable." The legacy data example discussed above is one illustration of this type of problem.

2. Production in "Reasonably Usable" Form

The phrase "reasonably usable," though seemingly clear, is also ambiguous. Rule 34(b) does not provide any guidance as to what "reasonably" means. The uncertainty of where to draw the line between what is "reasonably" usable and what is not will likely lead to litigation disputes. Furthermore, production of a form that is "reasonably usable" as an alternative to a form that is "ordinarily maintained" leads to additional confusion, because the language of Rule 34 causes the two alternatives to appear equal.[84] Given the equal status of the two alternatives, if a party produces the information in an "ordinarily maintained" form, it does not need to produce the same information in a "reasonably usable" form; by producing the "ordinarily maintained" form, the party has complied with Rule 34's requirement. Since information in a form that is "ordinarily maintained" is not necessarily "reasonably usable,"[85] and because Rule 34(b) equates the two forms, a party could argue that "reasonably usable" form does not require much usability. Specifically, the party could emphasize that pursuant to Rule 34, reasonable usability is an option, not a requirement.

Even though the phrase "reasonably usable" is used several times elsewhere in the Rules, the other uses do not make the phrase any clearer. Rule 34(a) first uses the phrase in its provision explaining document production.[86] It states that a party may request electronically stored information that is translated by the responding party into a "reasonably usable form."[87] Rule 45(d), setting forth the provisions for

82. *Id.*

83. *Id.*

84. *See* Rule 34(b)(ii) ("[I]f a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained *or* in a form or forms that are reasonably usable.") (emphasis added).

85. *See* discussion of "legacy" data, *supra* notes 80–83 and accompanying text.

86. FED. R. CIV. P. 34(a).

87. *Id.*

responding to subpoenas, also uses the phrase while restating the language as it appears in Rule 34(b), specifically referring to production of information pursuant to a subpoena.[88] Neither of these other uses clarify the meaning of the phrase.

In the end, Rule 34 does not lay out what is required by the words "ordinarily maintained" or "reasonably usable." This ambiguity suggests that it is necessary to look beyond the language of Rule 34(b)(ii) to determine what it requires of litigants. A look at the Rules' principle of interpretation, as set forth in Rule 1, can help resolve the ambiguity.

B. CONSTRUING RULE 34(b)(ii) PURSUANT TO RULE 1

Rule 1 requires that all other rules be construed "to secure the just, speedy, and inexpensive determination of every action."[89] This principle of interpretation "reflects the spirit in which the rules were conceived and written."[90] Despite multiple amendments to the Rules, "Rule 1 remains as the over-arching and most comprehensive principle of construction."[91] Thus, even though the language of Rule 34(b) is ambiguous, a possible resolution emerges if one looks to the considerations of justice, speed, and expense set out in Rule 1. Examining the principles in Rule 1 leads to the conclusion that Rule 34(b)(ii) requires, as opposed to permits, that documents be produced in a reasonably usable way.

1. *"Just" Determination*

Looking to the "just" determination prong of Rule 1, one district court stated, "[a] lawsuit is not a game but a search for truth. The ends of justice are served, not by giving one side a vested right to exhaust the other, but by affording both an equal opportunity to a full and fair adjudication on the merits."[92] In another case speaking to the same prong the court stated that one of discovery's primary objectives is the elicitation of the facts to promote decisions in accordance with dictates of justice.[93] These statements suggest that the idea behind the "just" determination prong is to reach the resolution of the case by having the procedure bring out, rather than hide, the relevant facts. This is consistent with the concept under which the Rules were adopted: "to put an end to the sporting theory of justice."[94]

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88. FED. R. CIV. P. 45(b)(1)(B) ("If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.").

89. FED. R. CIV. P. 1; *see also City of Merced v. Fields*, 997 F. Supp. 1336, 1337 (E.D. CAL. 1998).

90. 4 WRIGHT & MILLER, *supra* note 73.

91. *Id.*

92. Polaroid Corp. v. Casselman, 213 F. Supp. 379, 381 (S.D.N.Y. 1962).

93. *In re* Ira Haupt & Co., 253 F. Supp. 97, 99–100 (S.D.N.Y. 1966).

94. Cent. Distribs., Inc. v. M.E.T., Inc., 403 F.2d 943, 946 (5th Cir. 1968); *accord* Martin v.

In construing Rule 34(b)(ii) in light of Rule 1's mandate to secure the "just" determination of an action, one can read the phrases "ordinarily maintained" and "reasonably usable" as going beyond their plain meaning, in order to ensure that the data produced is such that the receiving party can discover the necessary facts. Going back to the example of legacy data, if the responding party has the requested information stored both as "legacy" data and as something more updated, "just" determination might require the responding party to produce the more accessible form, despite the indication from Rule 34's plain language that the responding party has the choice of which form to produce. This interpretation is supported by the Rules' goal "of tak[ing] the sporting element out of litigation . . . by affording each party full access to evidence" in his opponent's control.[95]

2. "Speedy" and "Inexpensive" Determination

Several district courts have focused on Rule 1's "speedy" determination prong in construing the Rules because, as one court put it, "one of the basic purposes of the Rules of Federal Procedure is to secure the 'speedy' determination of pending litigation."[96] Another district court in the Seventh Circuit concluded, "[c]ooperation during the discovery process is essential" to the principles of Rule 1.[97] The same court further explained that "[t]his is not to say that parties must spare no expense and scour the four corners of the earth for discoverable material; however, they must make genuine efforts to accommodate each other."[98] Because this explanation invokes the "inexpensive" determination prong, in addition to playing a role in the "speedy" prong, I will address both prongs together.

The principle requiring a "speedy" and "inexpensive" determination of the action can also guide parties' and courts' understanding of Rule 34(b)(ii).[99] Although Rule 34(b) is not clear as to the requirements for parties with respect to the default form of production, the requirement of a "speedy" and "inexpensive" determination in Rule 1 suggests that the responding party cannot produce electronically stored information in a form that is "ordinarily maintained," but not "reasonably usable." A form of production that is not "reasonably usable" is contrary to the "speedy" determination principle, because a form that is not "reasonably usable" necessarily slows litigation. Additionally, a form that is not "reasonably usable" may force the receiving party to spend more money than necessary to access the data, violating the "inexpensive" prong of

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Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).

95. *Martin*, 297 F.2d at 56.

96. Canup v. Miss. Valley Barge Line Co., 31 F.R.D. 282, 283 (W.D. Pa. 1963).

97. Frazier v. Layne Christensen Co., 380 F. Supp. 2d 989, 995 (W.D. Wis. 2005).

98. *Id.*

99. *See* FED. R. CIV. P. 1.

Rule 1. Thus, a form that is not "reasonably usable," though seemingly acceptable under the "ordinarily maintained" option for production, will require the receiving party to spend an unnecessary amount of time and money to access the data. This would violate both the "speedy" and "inexpensive" prongs, and the resulting dispute would take up large amounts of the courts' time and resources. Consequently, the "speedy" and "inexpensive" determination prongs of Rule 1 require responding parties to produce the data in a reasonably usable form, even if the responding party has ordinarily maintained forms that are less accessible.

3. Courts' Discretion

To ensure the achievement of Rule 1's policy, district courts have broad discretion in administering the rules of discovery.[100] This discretion permits a court to work around a rule's ambiguity in order to secure the "'just, speedy, and inexpensive determination of the action.'"[101] One district court, in interpreting the original Rule 34, concluded that it should be construed liberally because "[t]he Federal Rules were established to take the guess work out of trials, not add to it."[102]

Due to Rule 1 and the courts' discretion in applying discovery rules, the responding party may not present the requesting party with electronically stored information in a form that is "ordinarily maintained" but not "reasonably usable" if it has an alternative that is also "reasonably usable." Returning to the "legacy" data example, if the responding party has information both in an updated format and as "legacy" data, Rule 1 requires that the production of the documents be in the updated format even if the "legacy" data is "ordinarily maintained." It is not sufficient to produce the "ordinarily maintained" form, even though the Rules appear to leave open this possibility. While following the policies set out in Rule 1 resolves many ambiguities in Rule 34(b)(ii), the Advisory Committee Notes further suggest how to interpret Rule 34(b)(ii).

C. THE ADVISORY COMMITTEE NOTES

The Advisory Committee Notes ("Committee Note(s)") consist of statements about the present state of the law as well as the intent behind the Rules, and act like a legislative history to the Rules.[103] Although the Committee Notes are an important source of guidance for litigants and courts, and are given considerable weight when interpreting the Rules,[104]

100. Goodrick v. Townsend, 2006 U.S. Dist. LEXIS 14712, at *4. (D. Idaho 2006).

101. *Id.* (quoting Fed. R. Civ. P. 1).

102. Sharon Steel Corp. v. Travelers Indem. Co., 26 F.R.D. 113, 115 (N.D. Ohio 1960); *accord* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 207 F. Supp. 407, 411 (M.D. Pa. 1962).

103. 4 WRIGHT & MILLER, *supra* note 73.

104. *Id.*; *see also* Miss. Publ'g Corp. v. Murphtree, 326 U.S. 438, 444 (1946).

they are not conclusive as to the meaning of the Rules.[105] As the Advisory Committee stated in a Committee Note to the original version of the Rules:

> Statements in the notes . . . should be taken only as suggestions and guides to source material. Such statements, and any other statements in the notes as to the purpose of the effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases.[106]

Despite this disclaimer, in later revisions of the Rules, the Committee Notes became more extensive and discursive.[107] The Advisory Committee has even used the Committee Notes to guide judicial construction of a Rule.[108] Thus, even though the Committee Notes are not binding, they do provide useful and influential guidance in determining the meaning of the Rules.

The Committee Note for Rule 34(b), which discusses the concept of a default form of production, states that the requesting party is not required to choose a form of production.[109] The Committee Note recognizes that the requesting party may not have a preference for a particular form, or may not know what form the producing party uses to maintain its electronically stored information.[110] The Committee Note then restates Rule 34(b)(ii), stating that "[i]f the form of production is not specified . . . the responding party must produce electronically stored information either in a form . . . in which it is ordinarily maintained or in a form . . . that [is] reasonably usable."[111] In this quote, the Committee Note takes the same problematic position as the Rule itself, viewing the two options as alternatives, despite the inherent conflict involved.[112]

After discussing the concept of a default form of production, the Committee Note next explains the requirements of Rule 34 in great detail. First, it states that in some circumstances the responding party may have to "provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information."[113] The requirement to provide assistance to the requesting party seems to implicitly recognize the problem of data that is not "reasonably usable" yet still

105. 4 WRIGHT & MILLER, *supra* note 73.
106. *Id.*
107. *Id.* at n.21.
108. *Id.*
109. FED. R. CIV. P. 34 advisory committee's notes.
110. *Id.*
111. *Id.*
112. *See supra* Part II.A.
113. FED. R. CIV. P. 34 advisory committee's notes.

permissible under the "ordinarily maintained" option. Although the Committee Note does not say when a responding party must provide "reasonable assistance," it appears that assistance would be required in those situations where the information is produced in a form that is not "reasonably usable." If the data were "reasonably usable," presumably such "assistance to enable the requesting party to use the information" would not be necessary. Thus, even if a responding party chooses to produce information in an "ordinarily maintained" form that is not "reasonably usable," the responding party is essentially giving the information in "reasonably usable" form by giving reasonable assistance. This is consistent with the above analysis which found that Rule 34 always requires the production of a "reasonably usable" form even if there is an alternative "ordinarily maintained" form that the responding party wishes to produce.[114]

The Committee Note next states that a party does not have to produce the information in a form that is ordinarily maintained, "as long as it is produced in a reasonably usable form."[115] Again, this language implicitly endorses the view that the "reasonably usable" form is always preferable.

The following sentence in the Committee Note slightly alters the analysis, stating:

> [T]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.[116]

This sentence suggests that the responding party should produce the most accessible and most "reasonably usable" form available. A party is not allowed to reduce the capabilities of very accessible information that is "ordinarily maintained" to a level that is still "reasonably usable," and then give it to the requesting party. According to this sentence, a "reasonably usable" form is not sufficient if the product was originally in a more accessible form. The Committee Note reinforces this point by stating: "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."[117]

The last sentence of the Committee Note, dealing with the default form of production, directly addresses the topic of this paper, stating:

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114. *See supra* Part II.B.

115. FED. R. CIV. P. 34 advisory committee's notes.

116. *Id.*

117. *Id.*

> Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).[118]

The Committee Note does not directly resolve the dispute over the production of "ordinarily maintained" information that is not "reasonably usable." Instead, it directs the parties and the courts to Rule 26(b)(2)(B), which does not require discovery if it is "not reasonably accessible because of undue burden or cost."[119]

The Committee Note's reference to Rule 26(b)(2)(B) implicitly supports this Note's conclusion that Rule 34(b)(ii)'s default production always requires the responding party to produce a "reasonably usable" form even if it has a different "ordinarily maintained" form. If the responding party has both forms available, then it cannot make a successful argument that producing the "reasonably usable" form instead of the "ordinarily maintained" (but not reasonably usable form) would be unduly burdensome or costly. Thus, contrary to Rule 34(b)(ii)'s language, the two alternative forms are not in fact alternatives. If available, the "reasonably usable" form always prevails.

D. Additional Drafting History

The drafting history of Rule 34(b)(ii) is also consistent with this Note's analysis of Rule 34. The final version of Rule 34(b) gives the responding party the choice of producing the requested electronically stored information either in a form in which it is "ordinarily maintained" or in a "reasonably usable" form.[120] The published draft of Rule 34(b), however, initially gave the responding party the choice between a form in which the information is "ordinarily maintained" and an "electronically searchable form."[121]

During the amendment's public comment period, several commentators challenged the "electronically searchable form"

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118. *Id.* Rule 26(b)(2)(B) states:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause . . . . The court may specify conditions for the discovery.

FED. R. CIV. P. 26(b)(2)(B).

119. FED. R. CIV. P. 26(b)(2)(B).

120. FED. R. CIV. P. 34(b)(ii).

121. JUDICIAL CONFERENCE REPORT, *supra* note 5, at 64; *see also* Jeffrey Greenbaum, *Report Regarding Changes to Discovery Rules*, A.B.A. SECTION OF LITIGATION, STANDARDS & POLICY, http://www.abanet.org/litigation/standards/docs/ediscovery_report.pdf (last visited Oct. 31, 2007).

alternative because "[a] form that is readily searchable on one party's system may not be easily searched, or searched at all, on another party's system."[122] Furthermore, this option would "authorize production in a minimally searchable form even though more easily searched forms might be available."[123] In response to these concerns, Rule 34(b) was revised, replacing the "electronically searchable form" option with "reasonably usable." The Advisory Committee was clear that the responding party would be able to give the receiving party the requested information in a "reasonably usable" form.[124] Alternatively, it could provide the responding party with a form in which it ordinarily maintains information, but if not reasonably usable, "the [responding] party might have to translate the information to make it 'reasonably usable.'"[125]

The drafting history supports this Note's analysis for several reasons. First, it implies that "ordinarily maintained" forms are effectively equivalent to "reasonably usable" forms, because the responding party might have to translate information into an "ordinarily maintained" form to be "reasonably usable." Second, the Advisory Committee acknowledged the problem with the "electronically searchable form" permitting the responding party to produce a minimally searchable form, suggesting the Advisory Committee knew the drafting of the Rules was consistent with the principle of Rule 1. A minimally searchable form is insufficient because it hides, rather than brings out, the facts,[126] and does not "put an end to the sporting theory of justice" as required by some courts.[127] Third, the fact the "reasonably usable" option replaced the "electronically searchable" option because it was insufficiently accessible, demonstrates that the Advisory Committee was working to make default production more accessible to the receiving party.

CONCLUSION

This Note has attempted to explain what actions parties must take in order to meet the requirements for default production under Rule 34(b). To summarize, Rule 34(b)(ii) gives responding parties an alternative between providing information in a form that is "ordinarily maintained" or one that is "reasonably usable." If a party provides the information in a form that is "ordinarily maintained," on the surface Rule 34 appears to say that it does not also have to be in a "reasonably usable" form. This apparent clarity is misleading and Rule 34's language is ambiguous.

Through Rule 1's mandate to give the Rules a construction that

122. JUDICIAL CONFERENCE REPORT, *supra* note 5, at 64.
123. *Id.* at 77.
124. *Id.* at 64.
125. *Id.*
126. *See In re* Ira Haupt & Co., 253 F. Supp. 97, 100 (S.D.N.Y. 1966).
127. Cent. Distribs., Inc. v. M.E.T., Inc., 403 F.2d 943, 946 (5th Cir. 1968).

secures "the just, speedy, and inexpensive determination of every action in fact," and Rule 34(b)'s drafting history, it is apparent that every production of information must meet the "reasonably usable" requirement. Even though a responding party has the option of producing information in an "ordinarily used" form, if that form is not reasonably accessible, then the responding party must take steps to make that format accessible to the receiving party. This requirement means that an "ordinarily maintained" form that is not "reasonably usable" must be made "reasonably usable" by the responding party.

This construction of Rule 34(b)(ii), though seemingly contrary to its plain language, secures a just, speedy, and inexpensive determination of the action, as required by Rule 1. Furthermore, this construction meets the intent of Rule 34's drafters to make the default production accessible to the responding party.

Courts should follow this construction in determining whether the form of production provided by the responding party meets the requirements of Rule 34(b)(ii). Furthermore, the Rules' drafters should address this construction by clarifying Rule 34(b)'s language and explicitly stating that a party must produce the electronically stored information in a "reasonably usable" form. Alternatively, the drafters of the Rules could address this issue in the Note accompanying the Rules, which would also have the effect of guiding both parties' and courts' interpretation of Rule 34. If the drafters do not clarify this point, the ambiguity will continue to trouble litigants and courts, reducing the capability of Rule 34 to fully achieve the purpose of the Rules.